

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GERALD BARTON,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:17CV01342 AFG
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

This pro se matter is before the Court on the motion of Defendant to dismiss this pro se medical malpractice case against the United States for failure to state a claim. For the reasons set forth below, the motion will granted.

Plaintiff filed his complaint on April 17, 2017, alleging that on November 15, 2012, he fell as he was walking to the restroom from his hospital recovery room after shoulder surgery at the John Cochran Veteran Affairs (“VA”) Hospital in St. Louis, Missouri, and that the VA medical providers did not adequately treat his injuries from the fall. He seeks compensatory and punitive damages.

The present motion to dismiss was filed on July 18, 2017. The government notes that although Plaintiff does not cite to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b), the complaint is properly construed as one brought pursuant to that statute. The government argues that the complaint must be dismissed because Plaintiff did not file, within 90 days of filing his complaint, an affidavit attesting that he had obtained the

written opinion of a health care provider which states that the government was negligent and this caused his damages, as required by Missouri Revised Statute § 538.225, which is applicable to this action.

Plaintiff did not respond to the motion to dismiss and did not file a health care affidavit. Rather on July 18, 2017, he submitted 57 pages of his medical progress notes. On August 8, 2017, the Court entered a Memorandum and Order explaining that a health care affidavit was required, and that the time for filing one had passed. The Court granted Plaintiff the maximum extension of time permitted under Missouri law to file such an affidavit, which resulted in a deadline of October 13, 2017. The Court noted that Plaintiff's pro se status did not excuse him from complying with the requirements of Missouri law on this matter, and cautioned Plaintiff that if he failed to file a health care affidavit by October 13, 2017, the Court would grant Defendant's motion to dismiss.


There has been no further activity in the case. Upon review of the record, the Court concludes that this case must be dismissed for failure to state a claim. *See Thake v. United States*, 4:08CV653TIA, 2009 WL 801618, at *3-*5 (E.D. Mo. Mar. 25, 2009); *Brown v. Luckett*, No. 407CV00703ERW, 2007 WL 2245830, at *4-*6 (E.D. Mo. Aug. 1, 2007). This dismissal will be without prejudice.

Accordingly,

IT IS HEREBY ORDERED that Defendant's motion to dismiss Plaintiff's complaint is **GRANTED**. (ECF No. 8.)

A separate Order of Dismissal will accompany this Order and Memorandum.

Dated this 26th day of October, 2017.


AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE